2014 WL 3053715 (S.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. California.

Dorothy DURBIN, Plaintiff,

v.

HARTFORD LIFE INSURANCE COMPANY and Does 1 through 10, Defendants.

No. 13cv0052-BEN (WMc).
March 24, 2014.

Plaintiffs Memorandum of Points and Authorities in Opposition to Hartford Life Insurance Company's Motion for Summary Judgment or Partial Summary Judgment

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Hon. Roger T. Benitez.

Date: April 7, 2014

Time: 10:30

Courtroom: 5A

Plaintiff, Dorothy Durbin hereby submits the following Memorandum of Points and Authorities in Opposition to Defendant, Hartford Life Insurance Company's (“Hartford”), Motion for Summary Judgment or Partial Summary Judgment.

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I PREFATORY STATEMENT

Because the nature of its conduct is so reprehensible, Hartford devotes the majority of its motion to the statutes of limitations. It contends that Mrs. Durbin was required to file this lawsuit by 1999, because Hartford ostensibly placed her on notice of a series of loans taken against her insurance policy in 1995, when it began to mail policy value statements to her address. Based on its transmission of these statements, Hartford asserts that each cause of action set forth in this lawsuit is time-barred.

Hartford's argument is misleading. Specifically, it blurs the distinction between Gary Jenkins' criminal conduct in taking loans against Mrs. Durbin's policy in the 1990's, and Hartford's much later decision to retain the monetary benefit of the loans after learning that Mrs. Durbin never asked for, or received, the loan proceeds. This distinction is critical because Hartford's wrongful conduct took place no earlier than October 28, 2011. On that date, Hartford made the 81 year old Mrs. Durbin a “take it or leave it” offer by which it would agree to return the proceeds of Loan 3 to Mrs. Durbin only if she would (1) forego her right to reimbursement on Loans 1 and 2; and (2) release and forever discharge Hartford from any and all claims she had, or might have in the future, regarding the loans, Hartford's performance under the insurance contract, and its coverage decisions.

Hartford's “take it or leave it” offer was prepared with the input of its legal department, and its draconian terms violate long-standing California law. See, e.g., *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 392. Accordingly, it was on this date that the earliest of the limitations periods began to run on Mrs. Durbin's causes of action.

Mrs. Durbin refused to capitulate to Hartford's heavy hand. As a result, Hartford did not reverse any of the loans, and continues to charge Mrs. Durbin interest thereon, while the policy value (and the amount Hartford is obligated to pay) continues to decline. Left with no alternative, Mrs. Durbin filed her lawsuit on November 13, 2012. The filing is well within the statute of limitations applicable to her causes of action for **Financial Elder Abuse** (four years); Breach of Contract (four years); and Breach of the Implied Covenant of Good Faith and Fair Dealing (two years).

As discussed in greater detail below, Hartford's other arguments also lack merit. Based thereon, the Motion for Summary Judgment or Partial Summary Judgment must be denied.

II FACTUAL STATEMENT

A. *Policy and Loans*

In 1988, Dorothy Durbin purchased a life insurance policy from Pacific Standard Life Insurance Company, through an agent, and relative by marriage, named Gary Jenkins. Mrs. Durban paid a one-time premium payment of $ 100,000. At the time, the policy had a death benefit of $326,000. (*Miller Decl.*, Ex. 1.) [1]

Mrs. Durbin owned the policy, and under its clear and unambiguous terms, only she could borrow against it. (*Id.*, see also, Ex. 2, *Depo. Pearson*, p.47, line 9 through p. 48, line 8.) Nonetheless, Jenkins took out three loans against the policy without Mrs. Durbin's knowledge or permission. He obtained the loans on October 3, 1990 (Loan 1), April 28, 1992 (Loan 2), and October 13, 1997 (Loan 3). (*Decl. Erickson*, ¶¶6 & 7.)

Pacific Standard issued the first two loans. (*Id.*) In 1994 Hartford assumed all of the obligations, benefits, and liabilities under Mrs. Durbin's Pacific Standard policy through a written Certificate of Assumption, including those obligations, benefits and liabilities created by the first two loans. (Ex. 1; Ex. 2, *Pearson Depo*, p.45, line 16 through p. 46, line 17.) [2] Hartford issued Loan 3 in 1997, and mailed the proceeds directly to Jenkins' post office box, rather than to Mrs. Durbin. (Ex.2, *Pearson Depo.*, p.74, lines 9-20.)

B. *Mrs. Durbin's Discovery of Gary Jenkins' Criminal Conduct*

In 2009, Mrs. Durbin learned that Jenkins had been arrested and charged with defrauding an **elderly** couple. (*Erickson Decl.*, ¶¶ 4-5 & 8.) Her interest piqued, Mrs. Durbin reviewed her life insurance statements, and learned for the first time that three loans had been taken against the policy in her name. (Ex.3.) Mrs. Durbin was 79 years old at the time, and a widower since 1990.

On May 7, 2009, Mrs. Durbin notified Hartford that she did not think she authorized the loans or received the loan proceeds. (Ex.4.) That same day, Hartford prepared a Fraud Allegation Worksheet. It attached a California Department of Insurance Press Release describing Jenkins' role in a $300,000 insurance scam, and his corresponding two-year prison sentence. (Ex. 5.)

On April 9, 2010, Hartford referred the matter to its Investigations Unit, where it was assigned to Senior Investigator Brian Erickson. (Ex.2, *Depo. Pearson*, p.74, line 21 through p.75, line 17.) The referral was made, in part, because of Jenkins' criminal past, and the fact that Hartford had sent the Loan 3 proceeds directly to Jenkins. (*Id.*, p.74, lines 2-20.)

C. *Hartford's Investigation Confirmed that Mrs. Durbin did not Obtain the Loans or Receive the Loan Proceeds*

Before his employment with Hartford, Erickson spent 27 years with the Minnesota State Patrol as a law enforcement officer. (Ex. 6, *Depo. Erickson*, p. 11, lines 7-14.) There, he climbed the ranks to become a commander and a chief **financial** officer. (*Id.*, p. 18, line 14 through p. 19, line 3.) As a Senior Investigator at Hartford, Erickson is responsible for investigating allegations

of fraud, including insurance agent fraud, and is practiced in the art. (*Id.*, p. 17, line 19 through p. 18, line 13; p.39, line 2 through p.40, line 17.)

As part of his work on the Durbin matter, Erickson communicated with Detective Thomas, of the San Diego County Sheriffs Department. Detective Thomas performed a criminal investigation of Jenkins' misconduct and was convinced that Mrs. Durbin did not receive the loan proceeds. Erickson did not disagree with Detective Thomas' conclusion. (*Id.*, p.50, line 24 through p. 51, line 4.) Erickson further determined that there was credible evidence to support Mrs. Durbin's contention that she neither requested the loans, nor received their proceeds. (*Id.*, p. 48, line 25 through p. 50, line 3; p.50, line 19 through p.51, line 4.) Erickson wrote:

> Independent review of the policy documentation by Investigative Services concludes that there is credible evidence to support Mrs. Durbin's contention that she did not request or receive the proceeds of those loans. While Investigative Services is unable to definitively identify who did receive those loans, it is our conclusion that Dorothy Durbin most likely did not.

(EX. 7.)

In the course of his investigation, Erickson traveled to California and personally interviewed Mrs. Durbin, Jenkins and his wife, Louise, and a former Jenkins' employee, named Gudrun Campbell. Erickson found Mrs. Durbin to be credible, candid and forthcoming. (Ex. 6, *Depo. Erickson*, p. 57, line 22 though p.59, line 12.) He also performed a background check of Mrs. Durbin's **financial** background and found nothing to indicate that she had a motive to falsely claim that she never took out the loans. (*Id.*, p. 77, line 3 through p.79, line 4.) In short, he understood that Mrs. Durbin was telling him the truth, (*Id.*, p.34, lines 2-4.)

Erickson's interview of Jenkins and his wife, Louise, left him with a distinctly different feeling. Erickson “got the impression that they were both trying to cover something,” and that Jenkins was not telling him the truth. (*Id.*, p.20, lines 2-10; p.23, lines 3-6; p.33, line 24 through p.34, line 1.) Jenkins was evasive, and refused to answer most of his questions. (*Id.*, p.53, line 22 through p.54, line 19.) Jenkins told Erickson that he had proof that he wasn't involved in the loans, but refused to provide Erickson with any of the alleged exculpatory information. (*Id.*, p. 54, line 20 through p.55, line 16.) In Erickson's opinion, “if (Jenkins) had nothing to hide, their file should have been something that would have been offered.” (*Id.*, p.28, lines 5-24.)

Jenkins admitted that he had a copy of one of the loan checks issued by Hartford, which alerted Erickson's suspicions. (*Id.*, p. 34, line 5 through p.36, line 19.) Erickson learned that Jenkins had failed to show up to a meeting he had scheduled with Detective Thomas to discuss his involvement in the loans. (*Id.*, p.59, lines 13-22.) Jenkins also refused to return Erickson's phone calls after their initial meeting. (*Id.*, p.36, lines 3-7.) Finally, Jenkins made a point of telling Erickson that he should speak to his former employee, Gudrun Campbell, about the events relating to the loans, but explained that was impossible because she had gone back to live in Germany. Erickson knew that this was a lie; Ms. Campbell lived in El Cajon. (*Id.*, p. 16, lines 18-23; p.81, lines 8-17.)

Erickson next interviewed Ms. Campbell, who worked for Jenkins for 20 years. (*Id.*, p. 60, lines 11-15.) He found Ms. Campbell to be nervous, believed that she was not telling the whole truth, and thought she knew something that she would not reveal. (*Id.*, p. 60, lines 19 through p.61, line 3.) Ms. Campbell opined that, as between Jenkins and Mrs. Durbin, she would believe Mrs. Durbin. (*Id.*, p.66, lines 9-13.) Ms. Campbell further admitted that Jenkins had pressured her with regard to another matter involving allegations of his participation in insurance fraud. When Erickson probed further, she became emotional, started to cry, and broke down:

Q. Okay. Did she get emotional during the interview with you?

A. She did.

Q. Can you describe her emotions?

A. She started crying.

Q. When did she start crying?

A. When I pushed her to give me answers about what she was not telling me.

Q. How did you push her?

A. I said - I asked her if she thought Dorothy didn't deserve to have the facts come out. And I wasn't sure at that point what I was asking for. But I was hopeful to get her to have a feeling for Dorothy and tell me what it was that she apparently wasn't saying.

Q. And how did she respond?

A. She broke down.

Id., p.61, line 14 through p. 62, line 5.

Finally, as part of his investigation, Erickson learned that, in order to obtain information about the loans, Jenkins had his wife, Louise, impersonate Mrs. Durbin in a telephone call to Hartford:
Q. Okay. So, in other words, he was using the impersonation scheme to extract information from Hartford regarding Hartford's processing of Mrs. Durbin's loan?

A. Yes.

Q. And that was information that he was not entitled to receive?

A. Correct.

Q. But he did receive the information?

A. That's my understanding.

Id., p.32, lines 4-13.

D. ***Hart ford offered to repay Loan 3. on the conditions that Durbin sign a release and agree that Loans 1 and 2 remain on the policy***

On July 28, 2011, Mrs. Durbin asked Hartford, for the first time, to put “my policy back to what it was before the loans were taken.” (Ex.8.) On October 14, 2011, Hartford internally agreed that only Loan 3 would be removed from the policy. (Ex. 9.)

However, rather than simply reverse the loan, on October 28, 2011, Hartford sent Mrs. Durbin its “take it or leave it” offer letter. (Ex. 10.) In an effort to create in Mrs. Durbin an insecurity about her prospects for a full recovery, Hartford falsely represented that the evidence against Jenkins was “inconclusive.” Nonetheless, it explained that it understood that Mrs. Durbin did not receive the benefits of Loan 3, and would be willing to repay that loan with interest. For reasons it did not explain, Mrs. Durbin would, as a condition to the acceptance of the offer, have to forego her right to reimbursement on Loans 1 and 2. (Ex. 11.) Furthermore, Mrs. Durbin would, as a condition to the acceptance of the offer, be required to sign a formal Release, whereby:

> In consideration of the transaction described above, Releasor hereby releases and forever discharges Hartford and all its officers, employees, subsidiaries, and agents and assigns from any and all actions, claims, demands or damages arising out of or related to the sale, representations, purchase, performance and/or coverage of the policy.

(Ex. 12.)

Hartford's legal department provided the release. (Ex. 13, *Depo. Melhorn*, p. 51, lines 1-18,) The 82 year-old Mrs. Durbin, was given until November 25, 2011, to accept the offer; otherwise the file would be closed. Hartford later extended the deadline several times, after it learned that Mrs. Durbin and her son were having difficulty in understanding the offer. (Ex. 14.) Hartford withdrew the offer on June 29, 2012, despite its knowledge that Mrs. Durbin neither procured the loans, nor received the loan proceeds. (EX. 15.)

An insurance company cannot threaten to withhold, and actually withhold, policy benefits it knows are due unless the insured agrees to sign a release foregoing the right to other benefits to which he or she is entitled. *Fletcher u. Western National Life Ins. Co*. (1970) 10 Cal.App.3d 376, 392; *Gruenberg v. Aetna Ins. Co*. (1973) 9 Cal.3d 566, 584; *Sprague v. Equifax* (1985) 166 Cal.App.3d 1012, 1032. Hence, Hartford's "take it or leave it" offer, and subsequent decision to leave all three loans on the policy after Mrs. Durbin refused to capitulate, violates long-standing California law.

III THE APPLICABLE STATUTE OF LIMITATIONS DOES NOT BAR MRS. DURBIN'S RECOVERY

Courts consider "the nature of the right sued upon, not the form of action or the relief demanded" to determine the applicable statute of limitations. *Jefferson v. J.E. French Co*. (1960) 54 Cal.2d 717, 718, quoted in *Richardson v. Allstate ins. Co*. (1981) 117 Cal.App.3d 8, 12. "What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct." *Barton v. New United Motor Mfg., Inc*. (1996) 43 CA4th 1200, 1207.

As set forth throughout the operative complaint and in this opposition, the primary interests involved in this action are (1) Mrs. Durbin's rights and Hartford's performance under the life insurance policy; and (2) Hartford's retention of Mrs. Durbin's property for a wrongful purpose.

A. *Mrs. Durbin's Financial Elder Abuse Cause of Action is Timely*

By the plain terms of the statute, **financial** **abuse** of an **elder** adult "occurs" when a person or entity "retains" the personal property of an **elder** adult "for a wrongful purpose." *Welf.& lnst.C.* § 15610.30(a)(1). A person or entity shall be deemed to have retained property for a wrongful purpose where the person or entity "knew or should have known that its conduct was likely to be harmful to the **elder** adult." *Welf.& lnst.C.* §15610.30(b). An action for damages for **financial** **abuse** of an **elder** must be brought four years after the date the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered the facts constituting **elder** **abuse**. *Welf.& lnst.C.* §15657.7.

Hartford did not learn that the loans were impermissibly taken against the policy until Erickson undertook his investigation, beginning in April 2010. (Ex. 16.). Mrs. Durbin did not ask Hartford to reverse the loans until July 28, 2011. (Ex. 8.) Hartford did not retain Mrs. Durbin's property for a wrongful purpose until October 28, 2011, when it demanded that Mrs. Durbin sign a release and waive her rights to Loans 1 and 2, in order to receive reimbursement of Loan 3; thus, the **financial** **elder** **abuse** occurred on that date. (Exs. 10, 11 & 12.) Mrs. Durbin discovered, at the earliest, the facts constituting Hartford's **elder** **abuse** when she received Hartford's "offer" letter in October 2011. (*Id.*) She filed her lawsuit on November 13, 2012, which is just more than one year later, and well within the applicable limitations period.

B. *Mrs. Durbin's Breach of Contract Cause of Action is Timely*

The statute of limitations for breach of written contract is four years. *Cal.Ciu.Proc.C.* § 337. Under the terms of the insurance policy, Hartford may reduce the policy value by the amount of any loans taken, and charge interest thereon. (Ex. 1.) By the same token, Hartford cannot reduce the policy value or charge interest where, as here, it knows that the owner of the policy did not procure the loans. (*Id.*)

Hartford breached the contract on June 29, 2012, when it withdrew its "offer," continued to charge interest on the loans, and maintained in force its reduction of the policy value, despite its knowledge that Mrs. Durbin neither procured, nor received the benefit of, the loan proceeds. (Ex. 15.) Based thereon, Mrs. Durbin's breach of contract cause of action is timely.

C. *Mrs. Durbin's Breach of the Implied Covenant of Good Faith and Fair Dealing Cause of Action is Timely*

The statute of limitations for breach of the implied covenant of good faith and fair dealing is two years. *Cal.Ciu.Proc.C.* § 339. Under the implied covenant, neither party to the contract may do anything which will injure the right of the other to receive the benefits of the agreement. *Gruenberg u. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 (Insurer wrongfully accused insured of arson, to avoid paying fire loss claim.) In *Fletcher v. Western National Life Ins. Co., supra*, 10 Cal.App.3d at 401, the court affirmed a judgment against the insurer in circumstances similar to the ones at bar, stating that the insurer's conduct in demanding a release and policy surrender was independently tortious as a breach of the implied covenant of good faith and fair dealing.

To reiterate, Hartford breached the implied covenant of good faith and fair dealing when it refused to reimburse Mrs. Durbin, unless she signed a release and agreed that Loans 1 and 2 would remain on the policy, despite its knowledge that Mrs. Durbin did not take out the loans or receive the benefit of the loan proceeds. This took place on October 28, 2011. (Ex. 10.) Accordingly, the cause of action for breach of the implied covenant is not time-barred.

IV EACH OF PLAINTIFFS CAUSES OF ACTION ARE VIABLE

For a variety of reasons, Hartford also argues that each of Mrs. Durbin's claims are "baseless" or not "viable." These assertions lack merit.

A. *Mrs. Durbin's Financial Elder Abuse is not "Baseless"*

Hartford first claims that Mrs. Durbin's **Elder Abuse** cause of action is baseless because statutory **financial elder abuse** did not exist until 1998. Whether **elder abuse** existed as a cause of action before 1998 is irrelevant to the resolution of this motion. As discussed, Hartford first engaged in **financial elder abuse** in October 2011. Statutory **elder abuse** existed at that point in time.

Hartford's next contention - that it took no monies or property from Mrs. Durbin - misinterprets the **Elder Abuse** law. As previously discussed, **financial abuse** occurs when an entity "retains" the property of an **elder** adult for a "wrongful use." *Welf. & Inst.C.* § 15610.30(a)(1). An entity "retains" personal property when an **elder** "is deprived of any property right." *Welf.& Inst.C.* §15610.30(c). An entity shall be deemed to have retained property for a wrongful purpose where the person or entity "knew or should have known that its conduct was likely to be harmful to the **elder** adult." *Welf.& Inst.C.* §15610.30(b).

Giving Hartford the benefit of every doubt, it retained Mrs. Durbin's property for a wrongful purpose when it refused to reimburse Mrs. Durbin for Loan 3, and continued to charge interest thereon, even after it decided that the loan should be repaid. At that time, it "knew or should have known that its conduct was likely to be harmful" to Mrs. Durbin.

B. *Mrs. Durbin's Breach of Contract Cause of Action is Viable*

Hartford also contends that Mrs. Durbin has no grounds to recover on a Breach of Contract theory because the policy specifically allowed Hartford to reduce its value by the loan amounts. However, the policy only permits loans to be taken out by the policy "Owner." (Ex. 1.) Hartford cannot reduce the policy value or charge interest where, as here, it knows that the Owner did not request the loans. (*Id.)*

As discussed, Hartford first learned that Mrs. Durbin did not take out the loans in October 2011. Hartford breached the contract on June 29, 2012, when it withdrew its offer, continued to charge interest on the loans, and maintained in force its reduction of the policy value, despite its knowledge that Mrs. Durbin, the Owner of the policy, neither procured, nor received the benefit of, the loan proceeds.

Relying upon the wholly inapposite *Careau & Co. v. Security Pacific Business Credit* (1990) 222 Cal.App.3d 1371, 1388, Hartford next argues that Mrs. Durbin has not sustained contract damages. In *Careau*, the plaintiff sued Security Pacific for failing to fund the purchase of Julius Goldman's Egg City. As a result, the plaintiff was forced to obtain funding from another, more expensive source, and sued Security Pacific for the difference. The court held that Security Pacific's contractual commitment to fund the purchase was conditional. More specifically, a letter modifying the alleged contractual commitment stated that "it should not be relied upon by any third party as a commitment to make a loan." Under these circumstances, the plaintiff failed to plead a cause of action for breach of contract. *Id.*, at 1389.

Careau does not concern insurance, or loans against insurance policies. The contract between Mrs. Durbin and Hartford is not, in any way, conditional. Whether the plaintiff in *Careau* actually incurred damages as a result of Security Pacific's alleged breach of contract was not even discussed in the case. Under these circumstances, *Careau* does not control.

On point is *Fletcher v. Western National Life Ins. Co., supra*, 10 Cal.App.3d at 401. *Fletcher* holds that the withholding of insurance benefits in situations like this one, sounds in both contract and tort:

> The irnplied-in-law duty of good faith and fair dealing imposes upon a disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy. We think that, as in [*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425], the violation of that duty sounds in tort notwithstanding that *it also constitutes a breach of contract.* (Emphasis added)

C. *Mrs. Durbin's Breach of the Implied Covenant of Good Faith and Fair Dealing Cause of Action is Viable*

Hartford posits four arguments against Mrs. Durbin's cause of action for Breach of the Implied Covenant of Good Faith and Fair Dealing. First, it asserts that there can be no bad faith where there is no breach of contract. This statement is accurate as a general statement, but fails to consider the fact that Hartford breached the contract in this case. (See, IV, part B, *supra.)*

Hartford's second argument - that its conduct is not unreasonable - is contradicted by *Fletcher v. Western National Life Ins. Co.*, *supra* 10 Cal.App.3d, 401; *Gruenberg v. Aetna Ins. Co.*, *supra*, 9 Cal.3d at 484; and *Sprague v. Equifax* (1985) 166 Cal.App.3d 1012, 1032. Each of these cases stand for the proposition that an insurer may not threaten to withhold benefits, or offer payment of benefits conditionally, without facing liability for breach of the implied covenant of good faith and fair dealing.

Hartford's third argument is that a *prima facie* case of insurance bad faith requires proof of out-of-pocket loss caused by the insurer's wrongful withholding of benefits. Mrs. Durbin's actual **financial** loss is demonstrated by Hartford's annual reduction of policy benefits by the extraction of interest on loans Hartford knows she didn't procure, as well as the fact that the policy value is reduced by the amount of any such loans. (Ex. 17.) As such, her loss is far from hypothetical.

Fourth, Hartford claims this dispute is merely a "lending transaction" rather than an insurance claim, and that the dispute is "over the policy" rather than a denial of a claim "under the policy."[3] However, this matter clearly involves a claim under the policy. Namely, (1) Mrs. Durbin's claim for restoration of her bargained-for life insurance policy to its rightful amount; (2) Hartford's coercive offer to repay Loan 3, if Mrs. Durbin signed a broad waiver; and (3) Hartford's withdrawal of its offer on Loan 3 despite its knowledge that the loans were unauthorized. Each of these acts arise under the "Policy Loans," "Account Value," and "Death Benefit" provisions of the policy, if not others. (Ex. 1.)

The fact that the death benefit is not presently due does not insulate Hartford from bad faith liability. See, *Schwartz u. State Farm Fire and Casualty* (2001) 88 Cal.App.4th 1329, 1335 (the legal principle that a breach of the implied covenant cannot occur unless policy benefits are due refers to whether the policy will eventually cover the claim, and does not depend on when such coverage finally attaches). In this case, there is no contingency in coverage -- the death benefit will be paid upon the passing of Mrs. Durbin.

The wide range of activity which violates the covenant of good faith and fair dealing is also demonstrated in *Spindle v. Travelers Ins. Companies* (1977) 66 Cal. App. 3d 95; *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal. App. 4th 869, 903-904 (Policy cancelled in bad faith); *Johnson v. Mutual Ben. Life Ins. Co.*, 847 F. 2d 600 (9th Cir. 1988). [Series of incorrect billing statements and termination notices gives rise bad faith to bad faith claim because "(p)eace of mind is one of the benefits an insured seeks by obtaining insurance" in citing cases]; *Traveler's Ins. Co. v. Lesher* (1986) 187 Cal. App, 3d 169, 182 (Bad faith in providing unqualified defense counsel, and refusing to participate in settlement discussions, despite the fact that it was ultimately determined that the carrier had no duty to defend or indemnify the insured).

V THE INDIVIDUAL DAMAGES ELEMENTS HAVE MERIT

In its motion, Hartford contends that there is no factual basis to support Mrs. Durbin's individual damages claims. These assertions lack merit as well.

A. *The Certificate of Assumption Establishes that Hartford Assumed the Obligations set forth in the Pacific Standard Policies*

As set forth in Part II, A, *supra*, in 1994, Hartford specifically represented to Mrs. Durbin that it assumed all liabilities under the policies issued by Pacific Standard Insurance Company. (Ex. 1.) The Certificate of Assumption affixed to the policy issued to Mrs. Durbin reads, in pertinent part, as follows:

CERTIFICATE OF ASSUMPTION

This certifies that, except in regard to claims incurred prior to the effective date, HARTFORD LIFE INSURANCE COMPANY assumes all liabilities under the contract or certificate to which this Certificate is attached, which was originally issued by PACIFIC STANDARD LIFE INSURANCE COMPANY. HARTFORD LIFE INSURANCE COMPANY will pay all benefits in strict accordance with the terms of the contract. ... (Emphasis in original.)

Mrs. Durbin's claims were not incurred before 1994; but rather incepted, at their earliest, when Mrs. Durbin informed Hartford that she did not believe that she took the loans out against the policy. The utter fallacy of Hartford's argument is further demonstrated by the fact that it investigated Loans 1 and 2; and, to this very day, continues to earn interest on the very loans that it claims it has "nothing to do with." (Ex. 13, *Depo. Melhorn*, p.58, lines 14-22.

B. ***Mrs. Durbin Incurred Emotional Distress Damages***

Hartford claims that, as Mrs. Durbin testified in her deposition, she had no knowledge of the loans and failed to recall speaking to anyone at Hartford regarding the same. However, at the time Hartford deposed Mrs. Durbin, she was suffering from an advanced state of dementia. Her current inability to recall events does not mean that they never occurred, or that she did not suffer as a result of Hartford's conduct. Indeed, Hartford's own claim file demonstrate that it was Mrs. Durbin that first informed Hartford of the suspicious loans. (Exs. 3 & 4.) Special Investigator Erickson spoke on the phone with Mrs. Durbin and met with her in person. According to his testimony, Mrs. Durbin was not, at that time, suffering from dementia. (Ex. 6, *Depo. Erickson*, p. 21, lines 16-25.) In any event, Mrs. Durbin's son, Richard Durbin, testified that she was a "nervous wreck," agitated that the money was gone, and agitated that she was expected to pay it back. (Ex. 18, *Depo. R. Durbin*, p.79, line 6 through p. 80, line 2.)

C. ***There is a Strong and Substantial Basis for an Award of Punitive Damages***

In direct violation of California law, Hartford's legal department required its **elderly** insured to sign a release in order to obtain a portion of the benefits to which she is entitled. As part of the presentation of its "offer," it fraudulently stated that the evidence regarding whether she took out the loans was "inconclusive." When Mrs. Durbin refused to accept less than what she was entitled to, Hartford exacted its retribution, by withdrawing its "offer," maintaining all three loans against the policy, and requiring its 80 plus year-old insured to continue to pay interest while the value of the policy declined. This reprehensible conduct, carried out against a particularly vulnerable victim, equals malice, oppression, and/or fraud, for which Mrs. Durbin is entitled to seek punitive damages.

Case law establishes that, in the insurance context, much less damning conduct has been held sufficient to award punitive damages. See, *George F. Hillenbrand, Inc. v. Insurance Co. of No. America* (2002) 104 Cal.App.4th 784, 818 ["Despicable" conduct was found where an insurer engaged in protracted, aggressive, nonmeritorious litigation against its insured that harmed his health, business and family); *Amadeo v. Principal Mut. Life Ins. Co*. (9th Cir. 2001) 290 F3d 1152, 1165 (applying Calif. law) [Insurer denied Insured's disability claim by adopting a plainly unreasonable interpretation of its policy and deliberately restricting its investigation in a bad faith attempt to deny benefits due Insured. This evidence would support a punitive damages award because it showed "a conscious course of conduct, firmly grounded in established company policy."]; *Major v. Western Home Ins. Co*. (2009) 169 Cal.App.4th 1197 [Insurer guilty of "oppression" where it repeatedly delayed review and handling of claim for homeowners benefits arising out of Cedar Fire). See also, *Shade Foods, Inc. v. innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847, 892 ("A careless disregard for the rights of an insured and an obstinate persistence in an ill-advised initial position" on the part of an insurer may amount to "oppression" under section 3294 of the California Code of Civil Procedure.] Based thereon, Hartford's argument lacks merit.

VI CONCLUSION

Based on the foregoing points and authorities, Plaintiff respectfully requests that the Motion for Summary Judgment, or alternatively, Summary Adjudiction, be denied.

Dated: March 18, 2014

LAW OFFICES OF CRAIG A. MILLER

By */s/ Craig A. Miller*

Craig A. Miller

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Footnotes

1 Unless otherwise noted, all exhibits identified are attached to the Declaration of Craig A. Miller.

2 Thus, Hartford is not, as it contends, a stranger to Loans 1 and 2, and without any obligations thereunder.

3 In suppurl of ils argument, Harlford relies upon *Jonalhen Neil & Assoc, v. Jones* (2004) 33 Cal.4th 917, 939 (Post-claim practice of retroactively billing an insured for an excessive premium); *Tilbury Constrs., Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466 (Insurer's performance in handling subrogation); *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263 (Not bad faith for insurer to seek reimbursement). These cases are not even remotely similar to this case, and do not support Hartford's arguments.

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